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By Electronic Filing

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Re: **EX PARTE**
CC Docket No. 01-92

Dear Messrs. Carlisle, Muleta, and Rogovin:

CTIA - The Wireless Association™ submits this reply to the *ex parte* letters filed in the above-referenced proceeding by John Staurulakis, Inc. ("JSI"), summarizing meetings with the Federal Communications Commission ("FCC" or "Commission") staff on October 25, 26, and 27, 2004.[1] During these meetings, JSI asserted that the Communications Act of 1934, as amended ("Act"), does not require wireless carriers to negotiate interconnection agreements with rural local exchange carriers ("LECs") and that state-filed wireless termination tariffs "fill a void in the law" by providing an incentive for wireless carriers to negotiate with rural LECs.[2] JSI ignores the fact that wireless carriers already are under an express legal obligation, pursuant to reciprocal compensation rules, to compensate LECs for the termination of wireless traffic.[3]

[1] Letter from John Kuykendall, Director - Regulatory Affairs, JSI, to Marlene Dortch, Secretary, FCC (Oct. 26, 2004); Letter from John Kuykendall, Director - Regulatory Affairs, JSI, to Marlene Dortch, Secretary, FCC (Oct. 26, 2004); Letter from John Kuykendall, Director - Regulatory Affairs, JSI, to Marlene Dortch, Secretary, FCC (Oct. 27, 2004); Letter from John Kuykendall, Director - Regulatory Affairs, JSI, to Marlene Dortch, Secretary, FCC (Oct. 28, 2004) ("JSI Letter").

[2] JSI Letter at 2.

[3] *See* 47 C.F.R. § 20.11(b)(2). JSI also conveniently ignores the fact that incumbent LECs have a corresponding duty to compensate wireless carriers for traffic originating on the incumbent LEC networks. *See* 47 C.F.R. § 20.11(b)(1); 47 U.S.C. § 251(b)(5).

The Commission should reject JSI's argument because these unilateral tariffs allow rural LECs to bypass federally prescribed interconnection procedures and undermine otherwise bilateral obligations. Under the federally mandated negotiations process, both rural LECs and wireless carriers have mutual and equally powerful incentives and obligations to negotiate interconnection agreements. Wireless termination tariffs, however, eliminate rural LECs' incentives to negotiate in good faith and directly limit the ability of wireless carriers to provide meaningful competition in their territories.

The disagreement that exists regarding the lawfulness of unilateral wireless termination tariffs is not a mere academic dispute; it goes to the heart of Congress' intent in structuring the interconnection negotiation/arbitration model in the Telecommunications Act of 1996 ("Telecom Act") and has been directly addressed by the courts. Wireless termination tariffs thwart that intent, are anti-competitive, and adversely affect consumers. The Commission should halt the further proliferation of these tariffs by clarifying that wireless termination tariffs violate the Act and FCC rules and precedent, as requested in a long pending petition for declaratory ruling filed by T-Mobile USA, Inc., Western Wireless Corporation, Nextel Communications, Inc., and Nextel Partners, Inc.

In enacting the Telecom Act, Congress established a "detailed process for interconnection…under which competing telecommunications providers can gain access to incumbents' services and network elements by entering into private negotiation and arbitration aimed at creating interconnection agreements that are then subject to state commission approval, FCC oversight, and federal judicial review."[4] This detailed process is "central to the [1996 Telecommunications] Act, and is therefore not to be evaded by state rule-making."[5] Rural LECs, however, have attempted to circumvent the federal process through wireless termination tariffs that impose one-sided rates and terms in lieu of mutually negotiated interconnection agreements. Specifically, these tariffs allow rural LECs to thwart the federal process by (1) removing incentives for rural LECs to negotiate in good faith and (2) permitting multiple state proceedings that are not subject to federal review.

Under a unilateral tariff regime, rural LECs have no incentive to accept terms and rates that are less favorable than those under their tariffs and thus gain an unfair advantage in the negotiations process. Rather than negotiate in good faith for mutually acceptable terms, rural LECs could force wireless carriers either to accept terms that are at least as favorable as those under their tariffs or to seek arbitration. This result would render meaningless the requirement under Section 252 of the Act

[4] *Verizon North, Inc. v. Strand*, 309 F.3d 935, 941 (6th Cir. 2002) ("*Verizon North I*"), *cert. denied*, 538 U.S. 946 (2003).

[5] *Id.*

that carriers engage in true give-and-take negotiations before pursuing arbitration. What tariffs will do is encourage endless litigation (state arbitration or FCC complaints) because rural LECs would have no incentive to depart from the terms of their tariffs.

Wireless termination tariffs have been filed in at least 20 states, and formal state commission proceedings (*e.g.*, petitions, arbitrations, tariff investigations) are ongoing in more than 13 states.[6] These tariffs also are subject to review by state courts, a result that Congress "explicitly excluded" in establishing the interconnection procedures under Sections 251 and 252 of the Act.[7]

Consequently, the courts have found that the tariff process "places a thumb on the negotiating scales,"[8] "completely obviates the need for negotiations,"[9] and "provides an alternative route around the entire interconnection process."[10] For these reasons, every federal appellate court addressing the issue has preempted state tariffs filed in lieu of an interconnection agreement.[11] Wireless carriers have the same interconnection rights under the Act as competitive LECs,[12] and therefore any attempt to use LEC-wireless interconnections as a basis for narrowly construing the scope of the judicial precedent preempting state tariffs would have broad and adverse consequences for both the wireless and competitive LEC industries.

State-filed tariffs impose onerous rates and terms that impede market entry by wireless carriers and are inconsistent with federal substantive law requirements.[13] For

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[6] *See* Letter from Harold Salters, Director-Federal Regulatory Affairs, T-Mobile, to William Maher *et al.*, FCC, at 15 (July 8, 2004).

[7] *Wisconsin Bell v. Bie*, 340 F.3d 441, 444 (7th Cir. 2003) ("*Bie*"), *cert. denied*, 157 L.Ed. 2d 953 (Jan. 12, 2004).

[8] *Bie* at 444.

[9] *Verizon North Inc. v. Strand*, 367 F.3d 577, 585 (6th Cir. 2004) ("*Verizon North II*").

[10] *Verizon North I* at 943.

[11] *See Bie* at 444-45; *Verizon North I* at 943; *Verizon North II* at 584-85.

[12] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15998-99 ¶ 1012 (1996) ("*Local Competition Order*").

[13] Section 332(c)(3) prohibits state regulation over "the entry of or the rates charged by any commercial mobile service." *See* 47 U.S.C. § 332(c)(3). As the Commission has recognized, "the [LEC] charge for the intrastate component of interconnection may be so high as to effectively preclude [LEC-wireless] interconnection. This would negate the federal decision to permit interconnection, thus potentially warranting our preemption of some aspects of particular intrastate charges." *Implementation of Sections 3(n) and 332 of the Communications Act*, Second Report and Order, 9 FCC Rcd 1411, 1497 ¶ 228 (1994) ("*Second CMRS Report and Order*"). After enactment of the Telecom Act, the Commission re-affirmed its "intent to enforce Section 332(c)(3), for example, where state regulation of interconnection rates might constitute regulation of CMRS entry." *Local Competition Order*, 16006-07 ¶ 1026.

example, many tariffs purport to require wireless carrier to provide detailed billing records or traffic reports that are inconsistent with industry standards. Thus, rural LECs attempt to impose a Hobson's choice on wireless carriers—either spend millions of dollars in revising national billing systems to accommodate rural LECs or face call blocking. Individual LECs do not have the right to determine what systems national wireless carriers utilize, and conflicting rural LEC tariff conditions could easily inject chaos into the wireless industry.

Wireless termination tariffs also impose termination rates that are not based on total element long-run incremental costs and thus are inconsistent with the pricing standards of Section 252(d) of the Act. Frequently, these tariffs attempt to modify the interconnection obligations of the parties by imposing transport obligations on wireless carriers that are in direct violation of Section 51.703(b) of the FCC rules. Moreover, these tariffs provide for one-sided payments only to rural LECs, and not to wireless carriers, for traffic termination, in violation of the reciprocal compensation requirement of Section 251(b)(5) of the Act. Thus, by granting rural LECs the ability to file unilateral tariffs, the Commission undermines not only rate negotiations, but also the entire interconnection regime established under the Act and the FCC rules.

Contrary to JSI's argument, tariffs are not necessary to compel wireless carriers to negotiate in good faith in response to a request by a rural LEC for interconnection. In adopting LEC-wireless interconnection rules, the Commission "allowed LECs to negotiate the terms and conditions of interconnection with cellular carriers" and "required these negotiations to be conducted in good faith."[14] Wireless carriers are in fact under an express obligation to pay such compensation pursuant to reciprocal compensation rules. Section 20.11(b)(2) of the FCC rules provides that a "commercial mobile radio service provider shall pay reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial mobile radio service provider."[15] A rural LEC that is unable to reach agreement with a wireless carrier may file a complaint with the Commission under Section 208 of the Act.[16] Rural LECs have a legally enforceable right to demand good faith negotiations and a remedy if a wireless carrier fails to comply.

Contrary to JSI's assertion, wireless termination tariffs would not "fill a void in the law," but rather would subvert the federally prescribed interconnection

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[14] *Second CMRS Report and Order*, 9 FCC Rcd at 1497 ¶ 229; *see also* 47 C.F.R. § 20.11.

[15] 47 C.F.R. § 20.11(b)(2).

[16] *See The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services (Cellular Interconnection Proceeding)*, 4 FCC Rcd 2369, 2371 ¶ 15 & n.13 (1989) ("Should negotiations reach an impasse, and informal meetings fail, allegations regarding compliance with our good faith negotiation policy may be brought before the Commission pursuant to Section 208.").

procedures under which wireless carriers are entitled, but not compelled, to request interconnection negotiations with a rural LEC. In particular, wireless carriers and other telecommunications carriers have the right under Section 251(a) of the Act "to interconnect directly or indirectly" with other telecommunications carriers, as well as the right under Sections 251(c) and 252(a) to request negotiations for interconnection with incumbent LECs.[17] In cases where the traffic at issue is substantial, these carriers have ample incentives to negotiate direct interconnection agreements that provide mutual and reciprocal compensation for both parties. In other cases where the traffic is minimal, carriers justifiably may decline to request negotiations with rural LECs and choose instead to interconnect indirectly.[18] In these cases, each carrier continues to be fully and fairly compensated for terminating the traffic of the other carrier through their *de facto* bill-and-keep arrangement. Either party, however, may insist upon the establishment of compensation arrangements under current law, without the use of unilateral tariffs.

Under a unilateral tariff regime, however, wireless carriers would no longer have the latitude to choose not to request direct interconnection negotiations with rural LECs. Instead, they would be compelled to request negotiations with every rural LEC seeking to impose one-sided termination charges pursuant to tariff, even if the amount of traffic is insufficient to justify the costs of negotiating an agreement. As the rural LECs in Michigan have acknowledged, "[i]t would be a huge and unnecessary burden for each of the twenty-eight (28) Michigan ILECs to negotiate a separate interconnection agreement with each and every CMRS provider that terminates traffic on its network."[19]

Allowing rural LECs to impose wireless termination tariffs would unnecessarily complicate and delay the Commission's resolution of the broader issues raised in the long-pending inter-carrier compensation reform proceeding. These tariffs are utterly inconsistent with the Congressional and FCC regulatory framework mandating national rules and procedures for establishing interconnection through mutually negotiated or arbitrated agreements. They permit one party to an interconnection arrangement to use state law to unilaterally impose onerous terms and rates that ultimately prevent consumers from enjoying the full benefits of

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[17] *See* 47 U.S.C. §§ 251(a), (c), 252(a).

[18] Recognizing the efficiencies of indirect arrangements, the Commission has noted that "[w]here CMRS-LEC traffic volumes are small, as in rural areas…the CMRS carrier connects to LEC end offices connected to the tandem together with other carriers (including IXCs) interconnected through the tandem." *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9642-43 ¶ 91 (2001). The Commission further stated that "[b]ecause intercarrier, local CMRS traffic is often insufficient to justify a dedicated trunk, the majority of CMRS-to-CMRS call exchange occurs through a RBOC tandem switch." *Id.* at 9644 ¶ 95.

[19] *See* Comments of Michigan Rural Incumbent LECs, CC Dkt. No. 01-92, at 2 (Oct. 18, 2002).

competition. Consequently, sanctioning these tariffs would undermine the prospects of any meaningful federal reform of the existing inter-carrier compensation system.

Pursuant to Section 1.1206(b) of the Commission's rules, this letter is being filed electronically.

Respectfully submitted,

/s/ Michael F. Altschul
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